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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 119

GEORGINE ISELIN, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The report of this case in the Court of Claims is found in 59 C. Cls. 654, and the opinion of that court is set forth in the record beginning at page 31.

JURISDICTION

The appeal is from the Court of Claims under Section 242 of the Judicial Code. That court, upon findings of fact, by judgment filed May 5, 1924, dismissed the petition of the appellant. (R. 34.)

The application for appeal was filed June 20, 1924, and allowed June 23, 1924. (R. 35.)

STATEMENT

The action was brought to recover the sum of $3,352.50, with interest, being the amount of a tax paid upon the sale of tickets entitling the holder

to the use of a parterre box at the Metropolitan Opera House, in the City of New York, during the Grand Opera season extending from November, 1919, to April, 1920. The tax was assessed pursuant to the provisions of Section 800 (a) of the Revenue Act of 1918, Act of February 24, 1919, c. 18, 40 Stat. 1057, 1120.

The tax was paid under protest, claim for refund was filed and rejected (R. 31), whereupon this suit was brought.

THE STATUTE

The material provisions of the statute are as follows (40 Stat. 1120):

> Sec. 800. (a) That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—
>
> (1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;
>
> * * * * *
>
> (3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any

tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(4) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

(5) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of the amount for which a similar box or seat is sold for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; * * *

Similar provisions were contained in Section 700 of the Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, 318, except the provisions of Paragraph (3). That was new.

THE FACTS

Miss Iselin, the appellant, was the owner of 300 shares of the capital stock of the Metropolitan Opera & Real Estate Company, hereinafter called the Metropolitan Company (Finding I, R. 27), which owned the Metropolitan Opera House in the City of New York. (Finding II, R. 27.)

The Metropolitan Company, by lease which has been in operation for a number of years, leased the house to the Metropolitan Opera Company, the producing company, hereinafter called the Opera Company. The Opera Company, under the terms of this lease, agreed to reserve for the Metropolitan Company or such persons as it might designate, at every representation of Grand Opera given during the season, all the boxes situated in what is known as the parterre tier of the Opera House, and six free admissions were allowed for each of the boxes. (Finding III, R. 27.)

The Opera Company paid a yearly rent of $67,000, and covenanted to give a season of not less than 60 and not more than 70 regular performances in each year; while the Metropolitan Company agreed to pay the Opera Company a subsidy of $1,000 for each regular performance. (Finding III, R. 27.)

During the times material to this action the subsidy amounted to $70,000 for each season, which was duly paid. (Finding III, R. 28.)

This subsidy was provided by the stockholders of the Metropolitan Company pursuant to agree-

ments described in Findings V and VI, R. 28. In accordance with a by-law of the Metropolitan Company, each holder of 300 shares of its stock was entitled to a license to use a designated box upon the parterre tier at all performances of Grand Opera. (Finding IV, R. 28.)

In addition to being the owner of 300 shares of stock, Miss Iselin was a party to the subsidy agreements, and each year paid her assessments and was allowed the use of her box. In November, 1919, her assessment was $3,000. The Metropolitan Company has never realized any profit or paid any dividends to its stockholders. (Finding VIII, R. 29.)

During the season of 1919-20, Miss Iselin sold her box tickets for 47 performances for $9,525. (Finding IX, R. 29.)

The sale was made through an agent, who received a commission for his services. (Finding X, R. 30.)

On December 30, 1919, without protest, she made a return and paid the tax thereon under the provisions of Section 800 (a), Paragraph (5), said return being based upon an admission price of $60.00 for each performance, the established price at which boxes in the grand tier, the tier next above, were sold at the box office to the general public. (Finding XII, R. 30.) The grand tier boxes seat the same number of persons and are uniform in size with the stockholders' boxes, which are "substantially similar thereto."

(Finding XIII, R. 30.) (Note: In the lease Exhibit B, made a part of Finding III by reference (R 28), the grand tier is described as "the first or Grand Tier" (R. 15, paragraph 13; R. 16, paragraph 15.) On this tier is the box reserved for the directors of the Metropolitan Company and known as the "Directors' Box.")

Upon application by attorneys for the Metropolitan Company, the Commissioner of Internal Revenue, on December 24, 1919, made the following ruling (Finding XII, R. 30):

> And (*any*) stockholder of the Metropolitan Opera and Real Estate Company selling a ticket for admission to any of the boxes in question, whether direct or through the opera house box office, is subject to the tax imposed by paragraph (3) of this section of the statute and must mark such ticket in accordance with article 51 of the enclosed regulations. The basis for computing this tax is the difference between the established price of the box seat in the second tier for that performance, as determined by article 17 of the enclosed regulations, and the price for which the ticket is sold.

Complying with this ruling, the appellant made a return setting forth the transaction and paid to the collector the sum of $3,352.50, a tax equivalent to 50 per cent of the excess of said sum of $9,525, over $2,820 ($60.00 for each of the 47 performances). The suit is brought to recover the amount thus paid.

THE QUESTION AND CONTENTIONS

The question is whether the sale of tickets thus made by the appellant is taxable under Paragraph (3) of Section 800 (a) of the Revenue Act of 1918, hereinbefore set forth. The appellant claims that it was not; the Government, that it was.

In support of its contention the Government argues:

First. The appellant having sold the tickets for her box for an amount in excess of the established price at the ticket office for tickets to boxes substantially similar to stockholders' boxes, became liable for the tax under Paragraph (3) of Section 800 (a) of the Revenue Act of 1918.

Second. Congress having reenacted in the Revenue Acts of 1921 and 1924, without material change, the provisions of Section 800 (a), Paragraph (3), of the Revenue Act of 1918, must be held to have adopted the interpretation of those provisions by the Treasury Department and the Attorney General.

ARGUMENT

I

The appellant having sold the tickets for her box for an amount in excess of the established price at the ticket office for tickets to boxes substantially similar to stockholders' boxes, became liable for the tax under paragraph (3) of section 800 (a) of the revenue act of 1918

(1) The purpose of the statute

The manifest purpose of Congress in enacting the Revenue Act of 1918, as disclosed not only by Section 800 (a) but in the entire Act, was to raise

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from almost every possible source the enormous sums of money needed for the prosecution of the war. Very little escaped, and one of the sources deemed legitimate and probably fruitful was the tax on admission to places of amusement.

The statute plainly shows upon its face that Congress was mindful of the fact that admission tickets were sold both at the box offices and elsewhere; that they were sold even at the box offices at prices in excess of the "regular or established price"; that, when resold by others than the proprietors, they were sold at such prices as the traffic would bear, and that there was such a thing as a reasonable advance and such a thing as an unreasonable, speculative, and perhaps extortionate advance. The plain purpose of the statute was to impose a comparatively small tax upon the original sale to be measured by the regular or established price; to impose another small tax upon a resale at an advance regarded as reasonable, and to impose a large tax upon any resale at prices above the reasonable advance, and also a large tax upon an original sale, if that sale was made at a price in excess of the regular or established price.

The statute shows no intent to exempt from its operation any sale of tickets or any resale at a profit. Because Congress did not intend that the tax should be avoided through any arrangement between the proprietors of the place of amusement and those occupying such relations to the proprietors that they had the permanent use of boxes or seats, Paragraph (5) of Section 800 (a) was in-

serted, which provided for a tax equivalent to 10 per cent of the amount for which a *similar box or seat* was sold for each performance.

(*2*) *The application of the statute*

By reason of the fact that Miss Iselin, the appellant, was a stockholder in the company which owned the Metropolitan Opera House and leased it to the producing company, she became entitled to the use of a certain box in the parterre tier for all performances during the Grand Opera season. She therefore became liable to the tax under Paragraph (5). Recognizing this liability, and without protest, she made a return and paid that tax based upon an admission price of $60.00 for each performance (Finding XI, R. 30), that being the price charged at the box office for the boxes in what is known as the "grand tier." The grand tier is the tier above the parterre, and, obviously, the boxes in that tier are within the definition of "similar" boxes, inasmuch as they seat the same number of persons, are uniform in size with the parterre boxes which, as the Court of Claims finds, "are substantially similar thereto." (Finding XIII, R. 30.) That the "Directors' Box" is in the "grand tier" indicates that that tier is in no sense inferior to the parterre.

But thereafter, for reasons not disclosed and not important, she made a resale of the tickets for her box for 47 performances, receiving therefor the sum of $9,525. That sale was not made at the

ticket office but through an agent whom she employed to dispose of her tickets and to whom she paid a commission. (Finding X, R. 29, 30.)

This resale was strictly a business matter, a commercial transaction, and no different in principle, or under the law, from a resale of tickets at news stands, ticket agencies or by speculators upon the sidewalks. The Commissioner ruled that it was taxable under Paragraph (3) of Section 800 (a), because it was made elsewhere than at the ticket office, and at a price in excess of the established price of seats in boxes substantially similar to her box, and the price which she had herself returned as being the price for which similar boxes were sold. The price for similar boxes, thus established and returned, was $2,820, 47 performances at $60.00 each. The amount which she received was $9,525, and the difference $6,705. The 50 per cent tax upon that was $3,352.50. That amount she now seeks to recover. The only ground upon which she can succeed is the narrow one that there was no *established price at the ticket office* for her particular box, even though there was such an established price for other boxes found by the court to be uniform in size, seating the same number of persons and substantially similar.

We pass over any contention that Paragraph (5) of Subdivision 800 was intended to be exclusive of all other taxes imposed by this section. The purpose of Paragraph (5) was inclusive, not exclusive. The tax which it laid was "in lieu of

the tax imposed by paragraph (1)" and not in lieu of any other tax. No purpose is discoverable in the Act to exempt from its operations any resale of tickets or to create any favored class of ticket holders or ticket sellers.

Section 800 (b) of the Act provides in substance that no tax shall be levied under this title with respect to admissions all the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, etc.; but appellant does not claim that she comes within this *exception.* Her claim is for *exemption.* Where the provisions of an Act seem on their face to be of universal application, as here, one who claims exemption must show that the exemption is clearly defined and founded upon plain language. There must be no doubt or ambiguity of language used upon which the claim to the exemption is founded.

> It has been said that a well-founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power. [*Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146.]

See also *Hecht* v. *Malley,* 265 U. S. 144, 156.

It is to be observed that Paragraph (5) relates to the permanent use not only of boxes but of seats. If, instead of receiving the use of a box, the stockholder received tickets for six seats in the

orchestra of the Opera House, and the established price of orchestra seats was $5.00 each, and the stockholder should sell his tickets for $10.00 each, would it not be apparent that he was taxable under Paragraph (3)? Could it be claimed successfully that the resale was not taxable because the tickets for his particular seats, not being on sale, had no established price, when tickets for similar seats in the row in front, in the row behind, and adjoining his on either side were sold at the box office for $5.00 each? Such a claim would, we think, be clearly without merit. People cannot, by their own arrangement of small details, so easily defeat the purpose of an Act of Congress. The principle is the same in the case of boxes. Tax laws must be construed reasonably to carry out their purpose and intent (*Scottish, etc., Insurance Co.* v. *Bowland,* 196 U. S. 611, 629), and the obvious purpose of this statute would be defeated if escape from the tax imposed by Paragraph (3) could be effected upon the theory that there was no established price for the particular pieces of paper that admitted him to occupancy of those particular seats, though his seats were surrounded by other seats substantially similar upon which there was an established price.

(3) The opinion of the Attorney General

This question was submitted to the Attorney General by the Secretary of the Treasury. In opinion dated March 22, 1920, the Attorney Gen-

eral said in upholding the rulings of the Treasury Department, 32 Ops. Atty. Gen. 142, 144:

> Plainly, the purpose was to tax every person who sells admissions to a theater at a price in advance of that which is charged by the management of the theater for similar accommodations. Paragraph 3 imposes the tax upon every such sale made anywhere other than at the ticket office of the theater. It imposes a moderate tax upon the excess charged if the amount thereof does not exceed 50 cents per admission, and a heavier tax of 50 per cent if the amount of excess is more than 50 cents. Paragraph 4 provides for a straight tax of 50 per cent of all excess charged when the sale is made by the proprietors, managers, or employees of the theater. Under this paragraph it might, with force, be said that an owner of a box who arranges to have tickets sold at the ticket office of the theater would be chargeable with the straight tax of 50 per cent, regardless of whether the excess in charge amounted to 50 cents or more, but certainly it can not be said that by making such an arrangement he has escaped taxation altogether.

No purpose to exempt being apparent, it can not reasonably be inferred that Congress intended to tax small sums, ranging from a few cents to a few dollars, upon the sale of single tickets, and leave untaxed sums running into the thousands, as in the present case. Reduced to plain terms it would mean that Congress intended to impose a tax upon

one who bought a ticket for a performance at the Metropolitan Opera House for $3.00 and sold it for $4.00, and yet did not intend to impose a tax upon one who sold a box for the same performance for $300, when the established price of boxes sold to the general public, and substantially similar thereto, was $60.00. To support such a contention it is necessary to subject this legislation to unreasonable artificialities and refinement. Compare *Worth Brothers Co.* v. *Lederer,* Collector, 251 U. S. 507, *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501, 505.

(*4*) *The opinion of the Court of Claims*

The Court of Claims gave much weight to the fact that the appellant herself, in making her return under Paragraph 5, fixed the price of her box at $60.00, or $10.00 for each ticket, and that such price, recognized both by the appellant and the Government, necessarily became the established price upon which to base the tax imposed by Paragraph 3. (R. 33.) That court said (R. 34):

> It seems to be the contention of the plaintiff that a price must be established by some person having the power of establishment. Who other than the plaintiff had the power to establish the price of a box, or seats in a box, over which she had absolute control? And so when it came to establishing a price for her box for purposes of taxation she acquiesced in the price.

It is true that she sold her box for the 47 performances for a price which was far in excess of the $60. But because she established one price at one time and another price at another time, can she thereby be relieved of taxation by alleging that there was no established price as required by the statute? If so, then the statute is nugatory, not only as to the plaintiff but as to all others who might have it in their power to establish prices for tickets at first one price and then another.

The statute must be construed in the light of reason and common sense, and it is not perceived why the plaintiff should be exempted from the tax imposed by paragraph (3). She sold the tickets and obtained for them more than 50 cents in excess of the sum of the established price. The intent and purpose of Congress was to impose a tax in just such a case, and the fact that the plaintiff paid another and a different tax upon a box which she owned can not excuse her from paying the tax. Nor does it seem a great hardship even if the $3,000 assessment paid by her is taken into consideration, for after paying the assessment on her shares of stock and the tax she has still something over $3,000 as the result of her ticket sales.

It might also be noted that, in addition, she had the privilege of enjoying the performances other than the 47 for which she sold her tickets.

(5) One of appellant's contentions

Under Point IV of appellant's brief (pages 23 et seq.) it is pointed out that, in computing appellant's tax under Paragraph (3), there is an inequality between her tax and the tax paid by those who resell their tickets after paying the tax under Paragraph (1); because in the latter case the amount upon which the tax is to be computed is found by subtracting from the selling price the sum of the box-office price " plus the amount of any tax imposed under Paragraph (1)." Inasmuch, therefore, as she has not paid any tax under paragraph (1), the amount upon which her tax is computed is proportionally greater.

It is not claimed, however, that this inequality is such as to render the statute void. Of course there is no such thing as absolute equality in the incidence of taxes, nor is that necessary. Plainly, there is sufficient difference between those who, by reason of their relation to the management, have the permanent use of boxes and seats in places of amusement, and those who purchase tickets occasionally, or who engage in the purchase and sale of tickets as a business, to justify different classification. *Knowlton* v. *Moore,* 178 U. S. 41; *Stebbins* v. *Riley,* 268 U. S. 137.

Of course the appellant paid no tax under Paragraph (1). The tax she paid was " in lieu of the tax imposed by Paragraph (1)." Read literally, Paragraph (3) does not permit, in computing the

tax under Paragraph (3), anything to be subtracted from the selling price except the established price " plus the amount of *any* tax imposed under Paragraph (1)."

The tax under Paragraph (5) is at the same rate as the tax under Paragraph (1), and is stated to be " in lieu of the tax imposed by Paragraph (1)." The tax which appellant paid under Paragraph (5), upon the tickets for 47 performances, was $6.00 for each performance, or $282.00.

It seems to the Government that an equitable construction of these provisions would permit a taxpayer, in making return under Paragraph (3), to claim the benefit of the tax paid under Paragraph (5), in lieu of the tax under Paragraph (1). If this had been done in the present case, it would have reduced the appellant's tax by $141.00.

It is to be observed, however, that the tax under Paragraph (3) is "to be returned and paid, in the manner provided in Section 903, by the person selling such tickets." Section 903, 40 Stat. 1123, requires the taxpayer to make monthly returns to the collector of the district, and the tax shall, "without assessment by the Commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return." Evidently Miss Iselin, in making her return, did not claim the benefit of the tax paid under Paragraph (5). Perhaps she simply followed the literal language of Paragraph (3); perhaps the

amount was regarded as trifling, and perhaps it was overlooked. At any rate, the computation was her own, not that of the Collector, and no claim of erroneous or inadvertent computation of the tax seems ever to have been advanced, and even now there is no such claim made.

The case obviously was brought as a test case to determine whether stockholders of the Metropolitan Company were taxable under Paragraph (3). The sole contention has been, and is, that they are not, and the considerations set forth in Point IV of appellant's brief are advanced for the purpose of showing that that paragraph is not applicable, and not for the purpose of establishing an erroneous computation. Should the Court feel that an equitable construction of the statute permits the taxpayer, in paying the tax under Paragraph (3), to obtain the benefit of the tax paid under Paragraph (5), that construction would not be in conflict with the ruling of the Commissioner or of the opinion of the Attorney General. The ruling of the Commissioner of Internal Revenue (Finding XII, R. 30) was that the stockholders of the Metropolitan Company selling their box tickets were "subject to the tax imposed by Paragraph (3) of this section of the statute," and that the "basis for computing this tax is the difference between the established price" of the seats in the grand tier boxes and "the price for which the ticket is sold." This ruling defined the "basis" merely, and did

not attempt to point out any details of computation.

The rulings of the Commissioner, which were approved by the Attorney General, were as follows, 32 Ops., page 144:

> (1) The holder of a parterre box at the Metropolitan Opera House who sells to a third party his rights to the use of his accommodations at a price in excess of the box-office charge for the most nearly similar accommodations is liable to the additional tax imposed under paragraph (3) of section 800 (a).
>
> (2) The tax attaches whether the sale is made to a regular ticket broker for resale or to the purchaser direct through the agency of an officer or employee of the company.
>
> (3) The established price to be used as the basis for measuring the excess of price is that of the most nearly similar accommodations sold at the box office.

The opinion goes no further than to hold that the stockholders were subject to the tax imposed by Paragraph (3), and that the established price to be used as the "basis" was that of most nearly similar accommodations sold at the box office.

If the appellant has, as a matter of fact, returned and paid a tax slightly in excess of the proper one, it would seem to have been her own fault, and to have no real bearing upon the substantial issue involved.

II

Congress having reenacted in the revenue acts of 1921 and 1924, without material change, the provisions of section 800 (a), paragraph (3) of the revenue act of 1918, must be held to have adopted the interpretation of those provisions by the Treasury Department and the Attorney General

The ruling of the Commissioner of Internal Revenue which is now attacked and pursuant to which the tax in question was paid, was made on December 24, 1919. (Finding XII, R. 30.) Thereafter the question was presented to the Attorney General by the Secretary of the Treasury for his opinion, and he, in an opinion dated March 22, 1920, sustained the ruling of the Treasury. (32 Ops. Atty. Gen. 142.)

Since then there have been two general revisions of the revenue laws, the Revenue Act of 1921, Act of November 23, 1921, c. 136, 42 Stat. 227; and the Revenue Act of 1924, Act of June 2, 1924, c. 234, 43 Stat. 253. In each of these revisions, the provisions we are now considering were reenacted without substantial change. Revenue Act of 1921, Section 800 (a), 42 Stat. 289, and Revenue Act of 1924, Section 500 (a), 43 Stat. 320.

The reenactment by Congress, in these two successive revisions, of the provisions of the Act of 1918, in language which, so far as it imposes the tax, is identical, must be regarded as expressive of its satisfaction with and adoption of the provisions of the Act of 1918 as interpreted by the Treasury

Department and the Attorney General. *United States* v. *Falk & Brother,* 204 U. S. 143; *National Lead Company* v. *United States,* 252 U. S. 140, 146.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

DECEMBER, 1925.

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